IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, MATTHEW E. MCMILLAN, CASE NOS. 99-10 & 00-17	:	SC CASE NOS. 95,886 00-703
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Judicial Qualifications Commission's Response to the Honorable Matthew E. McMillan's Motion for Rehearing Before An Impartial Jury of Citizens Or, In the Alternative, An Independent Review of The Record By An Impartial Panel of Citizens

The Judicial Qualifications Commission, by and through its undersigned counsel and pursuant to Fla. R. Civ. P. 9.330(a), hereby files its Response to the Honorable Matthew E. McMillan's Motion for Rehearing Before An Impartial Jury of Citizens or, In the Alternative, An Independent Review of The Record By An Impartial Panel of Citizens.

ARGUMENT

Fla. R. App. P. 9.330(a) provides in very clear and unequivocal terms that motions for rehearing:

> shall state with particularity the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding.

The Committee Notes on this rule make it clear that this provision means precisely what it says; namely, that a motion for rehearing "should be utilized to bring to the

attention of the court points of law or fact that it has overlooked or misapplied in its decision, not to express mere disagreement with its resolution of the issues on appeal."

Bearing these principles in mind, this Court should deny Judge McMillan's Motion for Rehearing. The bulk of his motion merely disagrees with the determination of the issues by this Court. Each issue was carefully considered first by the JQC and then by this Court and any contentions to the contrary are without merit. The additional extraordinary relief sought by Judge McMillan that he be tried by "a jury of unbiased citizens from the jury pool of Manatee County" was not raised below or in his initial response to this court. *See* Motion for Rehearing at 3-4. Thus, it may not be raised for the first time on rehearing. Fla. R. App. P. 9.330(a). Even had the issue been properly raised, however, the relief requested is unauthorized and beyond this Court's power to grant absent a revision to art. V, section 12 of the Florida Constitution, which mandates the judicial disciplinary procedures utilized in

this state.[1] If nothing else, Judge McMillan's request that he be tried by a jury of Manatee County citizens is further evidence of his willingness to find fault with others (this time the JQC being the scapegoat) rather than accept responsibility for his own shortcomings.

The balance of Judge McMillan's Motion, albeit lengthy, is nothing more than a poorly disguised effort to vent his displeasure with the court's ruling. Each of the issues raised by Judge McMillan has been previously considered and rejected by this Court. For instance, with respect to the *Ocura* matter, Judge McMillan accuses the Court of relying upon a doctored transcript of the proceedings in that case, which he argues is "the same partial transcript the JQC produced in its Findings, which deliberately delete[d] a crucial sentence which goes directly to Judge McMillan's intent." *See* Motion for Rehearing at 8.

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[1] Those procedures have been repeatedly upheld by this Court. *See*, *e.g.*, *In re Graziano*, 696 So. 2d 744, 752-53 (Fla. 1997).

Equally absurd is Judge McMillan's claim that "the JQC finds and recommends whatever is wanted [presumably by the Investigative Panel] before the trial ever commences." *See* Motion for Rehearing at 5. Not only is this argument belied by the record (for example, the Hearing Panel exonerated Judge McMillan of all charges related to the *Lohrey v. Eastman* matter), it also ignores this Court's obligation to *independently* review the record to ensure that the JQC's findings are supported by clear and convincing evidence.

Judge McMillan presented this identical argument in his initial Response to this Court's Show Cause Order. *See* McMillan Response to Order to Show Cause at 57-59. The mere fact that he has now recast the argument in a slightly different light (*e.g.* a *Brady* violation) does not change the fact that this Court has previously considered and rejected the argument. Moreover, this argument entirely misses the mark. Judge McMillan's misconduct in *Ocura* consisted of him knowingly and purposefully injecting himself into Mr. Ocura's first appearance when (as the evidence clearly and convincingly shows) he knew that it was improper and unethical to do so since he was a material witness for the prosecution and indeed had provided an affidavit to law enforcement which provided probable cause to arrest Mr. Ocura in the first place. Irrespective of his motivation, the fact remains that Judge McMillan knowingly compromised Mr. Ocura's (and the public's) fundamental due process right to an impartial, disinterested tribunal. Such a person is not fit to hold judicial office.

Equally unavailing are Judge McMillan's arguments that this court overlooked the "overwhelming" evidence of his fitness to hold office or the "evidence of pressure, intimidation, and threats" he endured during his campaign for office. *See* Motion for Rehearing at 10, 25. Although purporting to call the court's attention to evidence which it misapprehended, these arguments are again nothing more than a

repeat of arguments which Judge McMillan made in his initial Response. For example, relying upon character witnesses who testified during the final hearing, Judge McMillan argued in his initial Response that his "[p]resent unfitness ha[d] not been shown" and that he had, in fact, raised public confidence in the judiciary because of improvements in the administration of justice he initiated in Manatee County. *See* McMillan Response at 53, 64-65.

He also argued in his Response, as he does here, that this court should consider all relevant circumstances surrounding his misconduct in determining the appropriate discipline. Judge McMillan's contention that the misconduct of others during his campaign should be considered in determining his fitness because it placed him in a one-time personal crisis is simply without merit. Lack of fitness was apparent not only from his continuing conduct during the campaign but his conduct in the *Ocura* matter. Indeed, Judge McMillan's refusal to accept the finality of the disciplinary process which prescribes the punishment for every other judge found guilty of misconduct in this state, coupled with his demand that he now be tried by "an impartial panel of citizens," best epitomizes his personalized view of the propriety of his actions and refusal to accept responsibility for his own actions.

In its opinion approving the Hearing Panel's recommendation of removal, this Court acknowledged but rejected what it referred to as "Judge McMillan's

rationalization for his campaign misconduct." *In re McMillan*, 2001 WL 920093 *12 (Fla. 2001). The Court also noted that "[w]hile the misconduct during the campaign reflects a candidate seeking to be elected upon promises of partiality, Judge McMillan's misconduct on the bench in the *Ocura* case reflects a willingness to sit in judgment in the face of a blatant conflict and personal bias." *Id*. at *11. Clearly, Judge McMillan has argued nothing in his Motion for Rehearing which this Court failed to consider in approving the Hearing Panel's recommendation that he be removed from office. His contention that his conduct has increased public confidence in the judiciary conflicts directly with his failure to explain or justify the actions that brought him before the Judicial Qualifications Commission or the full scale and unfettered attack on the judiciary made by his Motion for rehearing.

CONCLUSION

For the foregoing reasons, the Judicial Qualifications Commission respectfully prays that Judge McMillan's Motion for Rehearing Before An Impartial Tribunal of

Citizens Or In the Alternative, An Independent Review of the Record By An Impartial Panel of Citizens, be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Judicial Qualifications Commission's Response to the Honorable Matthew E. McMillan's Motion for Rehearing Before An Impartial Jury of Citizens Or, In the Alternative, An

Independent Review of The Record By An Impartial Panel of Citizens, has been furnished by U.S. Mail to **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **MATTHEW E. MCMILLAN**, 3311 46th Plaza East, Bradenton, FL 34203; **ARNOLD D. LEVINE, ESQ.**, Levine, Hirsch, Segall & Brennan, P.A., 100 S. Ashley Dr., Suite 1600, Tampa, FL 33602; and **SCOTT K. TOZIAN, ESQ.**, Smith and Tozian, P.A., 109 N. Brush St., Suite 150, Tampa, FL 33602, on September ____, 2001.

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